No. 05-1382

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents contend that, rather than holding the petition for a writ of certiorari pending its decision in *Gonzales* v. *Carhart*, No. 05-380, the Court should grant certiorari in this case and consolidate it with *Carhart*. Respondents, however, offer no compelling reason that the Court should take that duplicative approach. The merits briefing in *Carhart* is already well underway, and *Carhart* provides an appropriate vehicle to address the principal constitutional challenges that have been launched against the Partial-Birth Abortion Ban Act of 2003, including the overbreadth and vagueness arguments on which respondents focus. The petition for certiorari should therefore be held until this Court's decision in *Carhart*, and then disposed of accordingly.

1. Respondents primarily contend (Planned Parenthood Br. 8-9; San Francisco Br. 8-10) that certiorari is necessary in this case because, in *Carhart*, the court of

appeals did not address arguments that the Act was facially invalid because it was unconstitutionally overbroad and vague. Respondents do not deny, however, that this Court *could* address those arguments in *Carhart*, in light of the fact that the plaintiffs in *Carhart* preserved those arguments in the lower courts.[1] In its supplemental brief in support of certiorari in *Carhart* (at 8-9 & n.2), the government explained why it would be appropriate for the Court to address those arguments, even though the court of appeals had not passed on them. The Court granted certiorari in *Carhart* without narrowing or reframing the government's question presented, which asked the Court to consider whether the Act is invalid "because it lacks a health exception *or is otherwise unconstitutional on its face*." *Carhart* Pet. at i (emphasis added).[2] In its opening merits brief in *Carhart*, the government has addressed the overbreadth

[1] Respondents correctly note (Planned Parenthood Br. 8-9; San Francisco Br. 8-9) that the plaintiffs in *Carhart* did not expressly argue before the court of appeals that the Act was unconstitutionally vague. Respondents do not deny, however, that the plaintiffs advanced a vagueness argument before the district court, and they appear to acknowledge that the vagueness argument overlaps, at least to some extent, with the overbreadth argument, which the *Carhart* plaintiffs unquestionably *did* advance before the court of appeals. See Planned Parenthood Br. 9; San Francisco Br. 9. While those arguments are conceptually distinct, that overlap is substantial, insofar as both arguments turn on the construction of the same statutory language. Cf. *Carhart* Pet. Br. at 44-48 (discussing overbreadth and vagueness arguments). Nor do respondents contend that their overbreadth or vagueness claims in any way differ from those advanced by the plaintiffs in *Carhart*.

[2] Contrary to the suggestion of respondent Planned Parenthood (Br. 11 n.8), the italicized language makes clear that the question presented by the government's petition in *Carhart* expressly encompasses *all* facial challenges that have been launched against the Act.

and vagueness issues. See *Carhart* Pet. Br. at 44-48. Because there is no obstacle to the Court's considering and deciding those issues in *Carhart,* if it so chooses, there is no reason for the Court to grant plenary review in this case as well, and thus precipitate an additional round of merits briefing and, presumably, amicus filings on issues that will already be exhaustively addressed in the briefs in *Carhart* itself.[3]

2. Respondents suggest (Planned Parenthood Br. 7, 9-10; San Francisco Br. 8-9) that this case would constitute a better vehicle than *Carhart* for consideration of the overbreadth and vagueness claims because the district court made more detailed factual findings on, and the lower courts engaged in more substantial analysis of, those claims. There is no reason, however, that the Court cannot consider the findings and analysis of the lower courts in this case, to the extent they are relevant, in the context of analyzing the overbreadth and vagueness claims in *Carhart*. Indeed, in its opening merits brief in *Carhart*, the government not only discusses the factual findings made by the district court in this case, see *Carhart* Pet. Br. at 40, but also discusses (or cites) the analysis of the court of appeals on the overbreadth and vagueness claims, see *id.* at 47 n.14, 49. Moreover, substantial portions of the record in this case were in-

[3] Respondent San Francisco also notes (Br. 9) that the court of appeals in *Carhart* did not address the issue whether, assuming that the Act is unconstitutional, narrower injunctive relief would be appropriate under this Court's intervening decision in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). The Court, however, need not address the remedial issue in *Carhart* if it finds that the Act is constitutional. In any event, it unquestionably could address that remedial issue if it so chooses—or leave that issue to be decided on remand once the Court definitively passes on the Act's constitutionality.

corporated into the record before the district court in *Carhart*, and therefore may directly be considered by the Court in that case. See, *e.g.*, *Carhart* J.A. at 510-563, 622-706, 823-869.

3. Respondents also contend (Planned Parenthood Br. 10-11; San Francisco Br. 8) that the overbreadth and vagueness arguments are "threshold" arguments that the Court should consider first before addressing whether the Act is facially invalid because it lacks a health exception. That is not how the court of appeals approached the analysis in this case; it addressed the health-exception issue *before* the overbreadth and vagueness issues. Compare Pet. App. 14a-22a (health exception) with *id.* at 23a-40a (overbreadth and vagueness). In any event, the critical point is that the *primary* ground on which the Act was challenged in the lower courts—in this case, in *Carhart*, and in litigation in the Second Circuit, see *National Abortion Fed'n* v. *Ashcroft*, 437 F.3d 278 (2006)—was that the Act lacked a health exception. And even assuming, *arguendo*, that the overbreadth and vagueness arguments were "threshold" arguments that should be addressed first, that point would provide no additional justification for granting plenary review in this case, since, as explained, there is no reason that the Court could not address those arguments in that sequence in *Carhart* itself, if it chooses to do so.

4. Finally, granting certiorari in this case would precipitate another round of essentially duplicative briefing. Since the petition for a writ of certiorari was filed in this case, the government has filed its opening merits brief in *Carhart*, and numerous amicus briefs have been filed in support of the government. Absent an extension of time, respondents' merits brief, along with

any amicus briefs supporting respondents, would be due on June 26, 2006, and the government's reply brief would be due on July 31, 2006. The case will therefore be fully briefed and ready for oral argument in the Court's October sitting. Assuming that this case would be consolidated with *Carhart* for purposes of oral argument, granting certiorari in this case could delay the ultimate resolution of the extraordinarily important question of the Act's constitutionality. Given that *Carhart* presents an opportunity to address all the principal challenges to the Act, there is no reason for the Court to invite such additional briefing and possible delay by granting plenary review in this case as well.[4]

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Carhart*, No. 05-380, and then disposed of accordingly.

Respectfully submitted.

PAUL D. CLEMENT
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[4] Of course, respondents may file amicus briefs in *Carhart* and discuss, *inter alia*, any unique perspectives that they claim the court of appeals' decision in this case may provide with respect to the constitutionality of the Act.